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Supreme Court of the United States

October Term, 1996

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

against

DAVID A. ROBBINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NEW YORK CITY TRANSIT AUTHORITY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Statement of Interest

The New York City Transit Authority ("Transit Authority") submits this brief amicus curiae in support of respondents (David A. Robbins, et al.), who are the Board commissioners of the St. Louis Police Department. The parties have consented to the filing of this brief.[1]

The New York City Transit Authority is a New York State public authority and public benefit corporation created under the New York Public Authorities Law. All of the Transit Authority's board members are appointed by the Governor of the State of New York (Public Authorities Law §§ 1201(1), 1263(1)(a)), and it is not an agency, despite its name, of the City of New York. It runs, within New York City, the country's largest public mass transit system -- subways and bus lines that operate 24 hours a day, every day of the year -- and has over 40,000 employees, some 2,000 of whom are deemed "managerial" by the Transit Authority. As managers, while they may normally be scheduled to work five days per week (including weekends in many instances), seven or eight hours per day, they are expected to work longer if operational problems require. They are paid an annual salary and are not paid overtime, being treated by the Transit Authority as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, because they are, in the Transit Authority's view, within the FLSA's exemption from the Act's overtime pay requirements that is available for "bona fide executive, administrative, or professional" employees (29 U.S.C. § 213(a)(1)). If the Transit Authority could not treat its managers as exempt, it would have to deploy its managers less flexibly to try to limit

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[1]Copies of the parties' letters consenting to the filing of this brief have been filed with the Clerk.

the amount of overtime it would have to pay to already well-paid personnel, thereby tending to harm service; the Transit Authority would certainly have to pay out more money to its managers (who are already well paid in part because they were not expected to receive overtime pay), thereby exacerbating its already difficult financial situation; and, perhaps most importantly, the Transit Authority would risk having its managers become less willing to manage their subordinates in a cost-effective manner as the managers' incentive to try to minimize overtime among their subordinates would be compromised by their own potential eligibility for the kind of overtime they should be controlling.

In 1993, a number of Transit Authority managers commenced an action for FLSA overtime contending that, while their duties and responsibilities (and titles and other perquisites of employment) were entirely managerial, some aspects of some Transit Authority personnel policies conflicted with what is often called the U.S. Department of Labor's "salary basis test" (or "salary test"), set out at 29 C.F.R. § 541.118(a), which "test" suggests that certain deductions from salary may be inconsistent with FLSA overtime pay-exempt status; thus, those managers claim, they are all entitled to FLSA overtime pay, whether or not any of them actually had those salary deductions imposed on them. That action, *Lilenfeld v. Kiepper*, No. 93 Civ. 5691 (S.D.N.Y., filed Aug. 13, 1993), in which there are now 320 managers as plaintiffs, is pending in the United States District Court for the Southern District of New York; no liability determination has yet been made and that Court has recently put the case on its "suspense calendar" pending the outcome of *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (1996) (No. 95-897) -- that is, this case -- in this Court.

The personnel policies of the Transit Authority at issue in *Lilenfeld* differ from those of the St. Louis Police Department in *Auer* but some of the legal issues are similar, including the question of the applicability to state and local government employers of the "salary test" and specifically the salary test's disciplinary provisions, and the question of those provisions' proper interpretation and effect (if applicable to state and local government employers at all). Because of the enormous importance to the Transit Authority, and to state and local public employers generally, of those legal issues -- going to, for instance, not just the cost of employing and deploying managers but to the ability of such public employers to manage their managers and to have those managers cost-effectively manage their subordinates -- an additional perspective on some of those issues might assist this Court. The Transit Authority will here try to provide such a perspective in support of the respondents.

ARGUMENT

Introduction

In this brief, the Transit Authority will begin by focusing on the following matters, which relate to Point II of the *Auer* petitioners' brief: the intended purpose of the "salary basis test"; Congress's intentions in expanding the coverage of the FLSA to the public sector; and the bizarre nature of the salary basis test's disciplinary provisions and how those provisions are neither rationally explicable nor consistent with Congress's intentions with respect to the FLSA's coverage of state and local government employees. These subjects go to the threshold question of whether the salary basis test's disciplinary provisions should be enforced against state and local government employers at all. We think they should not.

This brief will go on to discuss aspects of the issues raised in Point IV of the petitioners' brief, that is (assuming the disciplinary provisions of the salary basis test are applicable to state and local governments) whether an entire cadre of hundreds of employees whose duties are found to be, or conceded to be, supervisory or managerial (*i.e.*, within the normal understanding of the statutorily exempt categories of "executive" or "administrative" personnel) should nevertheless all lose their exempt status because those supervisors or managers are theoretically "subject to" disciplinary suspensions of a kind that may conflict with some aspects of the salary basis test's disciplinary provisions even if, in fact, such impermissible disciplinary suspensions never occurred or occurred very rarely (in *Auer*, once). On this question, if the Court reaches it, we will urge that the clarified intentions of the Department of Labor ought to be controlling and, since they are consistent with the Eighth Circuit's approach in *Auer*, *Auer* should be affirmed.

I. THE SALARY BASIS TEST, AND SPECIFICALLY ITS DISCIPLINARY PROVISIONS, SHOULD NOT BE ENFORCEABLE AGAINST STATE AND LOCAL GOVERNMENT EMPLOYERS.

The Salary Basis Test and Its Intended Purpose

The salary basis test was prepared by DOL to help private sector employers determine whether their employees were, under the FLSA's section 13(a)(1) (i.e., 29 U.S.C. § 213(a)(1)), "bona fide executive, administrative, or professional" personnel, and thus statutorily exempt from the FLSA's requirements for overtime pay for work beyond 40 hours in a workweek for most employees. The word "test," however, is nowhere found in the provisions at issue (*i.e.*, at 29 C.F.R. §541.118(a)), and tends to obscure the purpose of the provisions (and thus may be misleading as to the deference that should be accorded to them). Shortly after the salary test reached what is basically its current form in 1954, the DOL clearly stated its general intentions for the salary test in language we think appropriate for the particular salary test provisions at issue here. According to the DOL, in language that the petitioner's brief (at 32-33) only partially quotes and apparently misconstrues, the salary test's provisions were to be used as "guides" to "assist" in determining whether (private sector) employees, "in borderline cases" where the employees' "prestige, status, and importance" are otherwise uncertain, should be deemed "executive, administrative, and professional" employees exempted by Congress from the FLSA's overtime requirements. U.S. Dep't of Labor, *Report and Recommendation on Proposed Revision of Regulations, Part 541*, at 2-3 (March 1958).

It should follow, therefore, that where employees do not dispute that they are managerial -- i.e., "executive" or "administrative" -- in terms of their duties and responsibilities,[2] or where the employees, after a trial (as in *Auer*) or otherwise based on a full evidentiary record, are found to be "executive" or "administrative" in terms of their duties and responsibilities, there is no logical need for further "guid[ance]" from the salary basis test.

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[2] For instance, it appears that the public employee plaintiffs in *Yourman v. Dinkins*, 826 F. Supp. 736 (S.D.N.Y. 1983), *aff'd*, 84 F.3d 655 (2d Cir. 1996), *petition for cert. filed sub nom. Giuliani v. Yourman*, 65 U.S.L.W. 3110 (July 29, 1996) (No. 96-152), and in *Mueller v. Thompson*, 858 F. Supp. 885 (W.D. Wis. 1994), *rev'd sub nom. Mueller v.Reich*, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3297 (Oct. 10, 1995) (No. 95-586), all chose not to challenge their otherwise exempt status as "executive, administrative, or professional" personnel based on their duties and responsibilities.

After all, the terms "executive" or "administrative" are the terms Congress used in the FLSA, and as a matter of dictionary definition and common understanding those terms involve employees' duties and responsibilities (or "prestige, status, and importance") in an employer's organization. Those terms do *not* involve such matters as whether the employees are "subject to," for instance, suspensions without pay for two or four days (while a workweek's suspension is irrelevant) for certain major safety-related infractions (but not other safety-related infractions or the most serious, bankrupting, non-safety infractions). The statutory "executive" and "administrative" exemptions from the FLSA's overtime pay requirements thus do not directly involve the arcane matters (some of which, various types of disciplinary suspensions without pay, are discussed below) that are the heart of the salary basis test. That test, in light of the DOL's historical statement of its basic purpose, presumptively should not be applied even as "guides" for determining executive or administrative status where, as in *Auer*, the relevant employees' duties and responsibilities are no longer "borderline" but have been found to be clearly within the range of "executive" or "administrative" personnel.[3]

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[3] The Department of Labor is not the only agency charged with helping governmental employers decide which employees should be deemed exempt from the FLSA overtime pay requirements, i.e., which employees Congress intended to be included in the statutory classes of "bona fide administrative, executive, or professional" personnel. The FLSA has also become applicable to millions of federal (civilian) employees and the agency charged by Congress with administering the FLSA for most such federal employees, the Office of Personnel Management, has nothing comparable to the DOL's salary basis test and its focus on deductions from salary. Instead, it relies on job levels and responsibilities to determine exempt status (5 C.F.R.

(continued...)

Moreover, even in a "borderline" situation in which the provisions of the salary test were intended to be used as "guides," the provisions neither on their face define "executive" or "administrative" status nor indicate that they should be controlling in determining such status. To the contrary, the provisions twice characterize themselves as mere "interpretations" (29 C.F.R. § 541.118(a)(6)), and do so in the context of explaining that whether or not (in, presumably, only a "borderline" case) a particular deduction from an employee's salary described in those provisions should affect that employee's exempt status "will depend upon the facts in the particular case" *(id.)*. If the salary test's provisions are called "regulations" (as many courts regularly do, and as the *Auer* petitioners do in their brief when they are not giving those provisions the august designation of "rules"), they are at most "interpretative" regulations, and thus entitled to deference only where they are shown to be persuasive reflections of Congressional intent. *See Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78, 84 (2d Cir. 1996). As discussed below, the salary basis test, and particularly its disciplinary provisions, should not be seen as persuasively reflecting Congressional intent vis-a-vis the public sector.

(...continued)

§ 551.201-208), a fact noted by the DOL at 57 Fed. Reg. 37667 (1992). This divergent approach to interpreting the same statutory exemption language (i.e., 29 U.S.C. § 213(a)(1)) should create, in itself, a doubt about whether the salary test should be given any special deference for state and local governments.

Congress's Intentions in Expanding the FLSA's Coverage to the Public Sector

Petitioners' brief to this Court seems to pass over any direct discussion of what Congress's intentions were in its expanding the FLSA's coverage to state and local governments with respect to the specific question of the kind of public employees that were to be covered. In fact, the relevant Senate and the House of Representatives Reports both repeatedly made those intentions clear. Congress intended the expanded coverage of the FLSA to apply to "non-supervisory" public employees. *See* S. Rep. No. 93-690, 93rd Cong. 2d Sess. 22 (1974); H.R. Rep. No. 93-913, 93rd Cong. 2d Sess. 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837.

It seems obvious that *if* the provisions of 29 C.F.R. § 541.118(a) -- whether termed parts of a "test," a set of "guides," or a set of "interpretations" -- are read to call for coverage of public employees who (by stipulation or by thoroughly supported judicial findings) are in fact supervisory (or managerial) in their duties and responsibilities, those provisions would conflict with Congress's intent because such supervisory and managerial personnel clearly were *not* intended by Congress to be covered by the expanded FLSA. And it goes almost without saying that there is apparently no evidence that Congress ever intended to impose restrictions on how public sector managers (in police departments or anywhere else) should be disciplined.

The Bizarre Nature of the Salary Basis Test's Disciplinary Provisions

The *Auer* petitioners' brief does not adequately describe the disciplinary provisions of the salary basis test that are at issue.

The inexplicable and bizarre nature of the disciplinary provisions renders them not merely unenforceable generally as irrational but also incapable of reflecting Congress's intentions in expanding the FLSA's coverage to the public sector's non-supervisory employees; the disciplinary provisions should thus not be applicable to public employers.

The salary test's disciplinary provisions allow an employer to suspend otherwise exempt employees without pay "for infractions of safety rules of major significance" -- defined as limited "to include *only* those [infractions] relating to the prevention of serious danger to the plant, or other employees" -- without affecting the employees' otherwise exempt status (29 C.F.R. § 541.118(a)(5), emphasis added). A suspension without pay for any other reason would jeopardize that exempt status, unless it lasts for an entire workweek (as opposed to, say, a five-day suspension that happens to cross over from one workweek to another) or happens to occur during a workweek in which the employee "performs no work" (29 C.F.R. § 541.118(a), last sentence).

To begin with, not only is there a potentially wide variety of judicial views on what would constitute a "safety rule of major significance,"[4] there is no apparent reason to distinguish between major safety infractions endangering "only" the "plant, or other employees" (for which a manager may be suspended for any period of time without pay without risk to exempt status)

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[4] For instance, in *Meringolo v. City of New York*, 908 F. Supp. 160, 169 (S.D.N.Y. 1995), the Court was apparently willing to deem *any* rule violation by a New York City Department of Corrections Captain sufficiently safety-related to be an infraction of a "safety rule of major significance." The Eighth Circuit in *Auer*, 65 F.3d at 710, seemed to disagree.

and safety infractions endangering *the public*, or to distinguish between safety infractions and "major" *non*-safety infractions. Indeed, during World War II and for several years thereafter the version of the DOL salary test then in effect allowed for (private sector) managers to be suspended for non-safety infractions (absenteeism) without losing their exempt status (because that was common practice in the private sector at that time);[5] and -- judging from the numerous FLSA lawsuits involving this matter -- it appears that in the *public* sector, in the decade since the FLSA became applicable to public-sector employees, at least the possibility of suspensions of managers for non-safety infractions is widespread (if, as in *Auer*, very rarely utilized).

Surely, for instance, there is no apparent sense in ignoring the facts that a public sector manager's negligence causing the loss of millions of public dollars or the shutting down of public-sector services, or the local government's bankruptcy, could be catastrophic to the public employer, even if "safety" is not involved directly; nor is there any apparent sense in ignoring the facts that a public sector manager's mistake could endanger the safety of the public but not of a "plant" or fellow employee. *See Childers v. City of Eugene*, 922 F. Supp. 403, 406 (D. Or. 1996). The oddness of the disciplinary provisions, moreover, can only be exacerbated by the fact that while the DOL's salary test limits the ability of employers to suspend their managers without pay for even the most egregious non-safety misconduct (or for misconduct affecting the public's safety although not the safety of the employer's "plant, or other employees"), employers are perfectly free not to pay those same managers for taking a day

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[5] *See* U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 24-26 (June 1949), discussed in *Mueller v. Thompson*, 858 F. Supp. at 894.

off for "personal" reasons (such as, presumably, attending a baseball game, a child's graduation ceremony, or a house closing (29 C.F.R. § 541.118(a)(2)).

In addition, the disciplinary portions of the salary test are bizarre in that suspensions of managers without pay for non-safety infractions (or for non-plant-or-other-employee safety infractions) *are* quite acceptable to the DOL, and will not endanger exempt status, *if* the suspensions are for one full workweek (typically five days, say, Monday through Friday); but such suspensions are somehow *not* acceptable if the five payless days cross from one workweek to another (say, Thursday, Friday, Monday, Tuesday, and Wednesday [or Thursday, Friday, Saturday, Sunday, and Monday][6]), or (normally) if the payless suspension is not for five days in a workweek but for one, two, three, or four days in that workweek. That too makes no sense.

Finally, *non*-safety suspensions (as well as safety-infraction suspensions involving serious risks to the public but not the employer's plant or other employees), even if less than a workweek, are *still* acceptable to DOL to preserve exempt status so long as, during the remainder of the workweek, the otherwise exempt employee *happens* not to come to work, for any reason, so that during that workweek it turns out the employee "performs no work" (29 C.F.R. § 541.118(a), last sentence). Thus, for instance, a manager's four-day non-safety suspension without pay (within one workweek) will not jeopardize exempt status if

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[6] The Transit Authority, which operates its subway and bus lines every day of the year (and 24 hours a day), has numerous managers with normal schedules that call for work on weekends and thus call for "regular days off" on, for instance, Tuesdays and Wednesdays. We assume that the St. Louis Police Department operates in a similar way.

the manager, by chance or otherwise, does not work on the fifth day (because, perhaps, it is a holiday, or because on the fifth day the manager is sick, on vacation, on jury duty, at a baseball game, or for any other reason "performs no work").

It should not be surprising, therefore, that the courts that do address the matter more and more are deciding that the disciplinary provisions of the salary test are inexplicable and bizarre. *See Childers v. City of Eugene*, 922 F. Supp. at 408 n.3 (disciplinary provisions are "puzzling" in that "the DOL in effect encourages more severe pay docking sanctions against exempt employees than the employer might otherwise choose to impose for disciplinary reasons. This 'one week or nothing approach'... [is as] bizarre [as the] limitation of 'major safety rules' to violations endangering co-workers and the plant, [thereby] excluding dangers presented to the public ..."); *Quirk v. Baltimore County, Md.*, 895 F. Supp. 773, 783-784 (D. Md. 1995) (the one week or nothing approach would lead to a "ludicrous result"). Provisions that are so inexplicable should be deemed unenforceable, and disregarded as a regulatory interpretation of the overtime pay exemption provided to "bona fide executive, administrative, or professional" personnel by the FLSA itself at 29 U.S.C. § 213(a)(1).

Moreover, the odd twists and turns of the disciplinary provisions have no rational connection to determining whether employees whose duties in all respects look managerial are in fact "executive" or "administrative." For instance, taking up the Seventh Circuit's apparent invitation in *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3297 (Oct. 10, 1995) (No. 95-586), the District Court in *Bowman v. City of Indianapolis*, 927 F. Supp. 309 (S.D. Ind. 1996), determined that the rationality of the disciplinary provisions' relationship to true "executive" or "administrative"

status is indeed so "'feeble'" as to make those provisions unenforceable:

> In particular, we do not think it is rational to say that because an employee who is otherwise considered an exempt administrative, professional or executive employee might be docked one or two or three days pay, that it necessarily follows that the employee must therefore really be an hourly employee. . . . [I]s a bank vice president, who clearly meets the duties test for an executive employee, and who is paid $100,000 per year, to be considered an hourly employee just because she might be docked a few days pay for swearing at the bank president? The regulation appears to say so but we see no logic in this. . . . [A] $35,000/year executive does not cease to be a $35,000/year executive just because she is suspended for four days for breaking a rule. We do not doubt that it might be rational to look to the length or frequency of disciplinary suspensions without pay as one of several factors in determining the employee's status. However, we do not think it is rational to consider such suspensions as *conclusive* evidence that an employee is hourly. We therefore find that the disciplinary component of the salary test is arbitrary and capricious, and that, in accordance with the Administrative Procedure Act, we must set aside that regulation.

927 F. Supp. at 315 (emphasis in original). This is a critical point because, as indicated above, Congress intended the FLSA, when expanded to cover the public sector, to cover public "non-supervisory" personnel. The disciplinary provisions of the salary basis test are bizarre and that bizarreness makes them not rational, let alone persuasive, guides for determining whether an employee who is otherwise "executive" or "administrative"

should nevertheless be deemed to fit into the category of public employees Congress intended to have the FLSA cover: "non-supervisory" employees.[7] *Cf. Freeman v. National Broadcasting Co., Inc.*, 80 F.3d at 84-85 (DOL interpretations concerning exempt status of journalists lacked power to persuade and should not be followed where they were designed in 1949, had failed to take account of changes since then in the work and circumstances of many journalists, were thus "anachronistic, even irrational," and "would produce a result incongruous with the purposes of [Congress in enacting] the FLSA").

This is not just an abstract matter. The real world consequences of failing to comply with the twists and turns of the disciplinary portion of the salary test regulations could be severe, indeed punishing in the view of the petitioners here and, for instance, in the view of the Second Circuit (and District

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[7] The petitioners' assertion that public employers can meet the disciplinary provisions' requirements without collapsing (albeit with some expense or deleterious side effects) misses the point. Just as would be true of a (hypothetical, 1954-era) provision calling for loss of exempt status of an otherwise "executive" employee if he does not wear a grey flannel suit every day he is in the office, the requirements of the disciplinary provisions -- at least in the public sector -- have *no* rational relationship to an employee's actual duties and responsibilities (or even level of pay), and thus have no significant value (let alone determinative force) in deciding whether well paid executive or administrative employees (in terms of duties) are really non-exempt "non-supervisory" (or "hourly") employees masquerading as managers. A regulated party's being able to take steps to avoid the consequences of irrational regulations cannot save those regulations from being struck down. *Cf. ALLTEL Corp. v. F.C.C.*, 838 F.2d 551, 561 (D.C. Cir. 1988) (an agency "cannot save an irrational rule by tacking on a waiver procedure").

Court) in *Yourman v Dinkins*: loss of exempt status of an *entire* cadre of hundreds of well-paid managers. As a practical matter, the only way for state and local public employers to be *sure* not to run afoul of the salary test's disciplinary provisions -- which are in part imprecise and in part inexplicably bizarre -- is to pay every suspended manager (at least for a full workweek) although he or she might *have to be suspended immediately*, even in the middle of a workweek. For instance, an immediate suspension might be required where the manager appears to have engaged in sexual or racial harassment of other employees, because the employer has a federal statutory obligation to eliminate such harassment from its workplaces (*see Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991)); or the manager's misconduct may make it essential that the manager *immediately* lose access to employer records or computers. Paying such a suspended manager would directly violate an aspect of the "public accountability" principle guiding most public payroll systems -- that public employees should not be paid for time they do not work -- and which principle, more and more courts are concluding, Congress did not intend the FLSA (and thus a DOL salary test) to interfere with. *See Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1352 n.2 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996).

A final determination of the enforceability of the disciplinary provisions of the salary test, if it results in the invalidity of those provisions, should render the *entire* salary test invalid. That test was essentially re-written in 1954 as an interrelated whole. For a court to find a part of the test inapplicable but to enforce the remainder would effectively be an exercise of judicial guideline rewriting or "rulemaking," which is, as the Ninth Circuit observed in deeming the entire salary test inapplicable to the public sector based on the invalidity of one portion of it, "a

power with which we are not invested." *Service Employees Int'l Union*, 60 F.3d at 1354.

The historical record shows that Congress did not intend through the FLSA to cover public employees above the "non-supervisory" level, let alone to regulate how state and local governments should discipline their managers.[8] The salary basis test's disciplinary provisions -- which were developed for the private sector (and to mirror evolving private sector practices) and never even the subject of hearings about, let alone revised to take into account, the practices and history of the public sector -- should not be applied to public sector employees and especially those found to be, in their duties and responsibilities, "executive" or "administrative" employees.

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[8] *See Bolick v. Brevard County Sheriff's Dept.*, __ F. Supp. __, 1996 WL 490201, *10-11, *12 n.3 (M.D. Fla. August 29, 1996), in which the court held the "disciplinary component of the salary test to be arbitrary and capricious, and therefore invalid, as applied to [otherwise exempt] law enforcement employees" because the test could not be reasonably applied "for use in determining the appropriate length for a suspension for a law enforcement officer" and observed that it would not be logical to "allow[] the tail to wag the dog ... i.e., to permit the salary [basis test] ... to be a central factor affecting how long a[n] [otherwise exempt] police officer will be disciplined."

II. IF THE SALARY BASIS TEST AND ITS DISCIPLINARY PROVISIONS ARE PROPERLY APPLICABLE TO STATE AND LOCAL GOVERNMENT EMPLOYERS, THIS COURT SHOULD CONFIRM THAT RARE SALARY DEDUCTIONS (FOR INSTANCE, CERTAIN DISCIPLINARY SUSPENSIONS WITHOUT PAY) THAT MAY BE IMPERMISSIBLE UNDER THE SALARY BASIS TEST SHOULD NOT RESULT IN THE ACROSS-THE-BOARD LOSS OF EXEMPT STATUS OF OTHERWISE EXEMPT MANAGERS OF STATE AND LOCAL GOVERNMENT EMPLOYERS.

The petitioners argue that, even though *actual* deductions from the plaintiffs' salaries that could be impermissible under the Eighth Circuit's understanding of the DOL's salary test and in particular its disciplinary provisions -- here disciplinary suspensions without pay of other than whole workweeks for reasons other than a violation of a major safety-of-plant-or-other-employees rule -- might be very rare or non-existent, nevertheless *all* of the hundreds of plaintiffs (even though only one had any such deductions made) should be deemed to have lost their exempt status (for the entire multi-year liability period) because they all were at least *theoretically* "subject to" (29 C.F.R. § 541.118(a)) impermissible salary reductions within what petitioners assert should be the meaning of that language in the salary test. Petitioners therefore assert that the Eighth Circuit erred in concluding to the contrary. If the salary basis test or its disciplinary provisions are held to be applicable to public employers, this Court should affirm the Eighth Circuit's decision because its view is the only one that (i) comports with the intent of the author of the "subject to" language and the salary basis test -- the DOL -- as that intent was clearly expressed by the DOL to this Court, *in this litigation*, and (ii)

comports with Congress's general view that the FLSA should not be a vehicle to create windfalls.

In the United States' May 31, 1996 amicus brief to this Court in this case, the Department of Labor's intended meaning of its own salary test's "subject to" language was made exquisitely clear. Rejecting reliance on theoretical possibilities (or rare examples) of pay deductions inconsistent with the salary test, and looking to the practical realities of actual conduct vis-a-vis a state or local government's managers as a group, the Department stated: "where no deductions have actually been made, or where there have been only isolated instances in which [impermissible] disciplinary suspensions have occurred, or where [impermissible] suspensions have occurred only under unusual circumstances, employees who are not themselves [impermissibly] suspended do not lose their salaried status." Brief for the United States as Amicus Curiae at 7 [informal pagination], *Auer v. Robbins*, No. 95-897 (Supreme Court, May 31, 1996) (LEXIS, Genfed Library, Briefs File). *This* DOL view of its own salary test is obviously consistent with Congress's statement (albeit one made in a different context) that the FLSA should not be interpreted to allow employees to "receive windfall payments" (29 U.S.C. § 251(a)(4)). *See also Kuchinskas v. Broward County*, 840 F. Supp. 1548, 1557 (S.D. Fla. 1993) (it would be "fundamentally unfair and inequitable" to interpret to salary test to call for "the 'granting of windfall awards of across-the-board retroactive overtime payments to public employees who never had any actual [impermissible] deductions made in their salaries, along with employees who rarely had such deductions . . . simply because their salaries were theoretically "subject to" the possibility of" such impermissible deductions) (quoting 57 Fed.Reg. 37669 (1992)).

Moreover, affirmance of *Auer* in this respect would have the important benefit of avoiding supervisory employees' losing the will, or at least some incentive, to supervise efficiently. The principle of "public accountability" (*i.e.*, not merely having government agencies not pay public employees for time they do not work, but also having those agencies be accountable to the taxpayers for the proper expenditure of funds) has been widely recognized by the DOL and the courts (*see*, 56 Fed. Reg. 45825 (1991); *Kuchinskas v. Broward County*, 840 F. Supp. at 1556) as a principle that the FLSA, and thus the salary basis test, should not be construed to interfere with.

"Public accountability," in the broader sense of governments' having the ability to control and so be accountable for their expenditures, depends on having managers who, among other things, direct non-supervisory employees cost-effectively (and minimize those employees' overtime in the process). If large groups of governmental personnel of undisputed managerial responsibility become potentially eligible for FLSA overtime because pay or personnel policies are even theoretically inconsistent in some way with a provision of the salary test -- because managers may be merely theoretically "subject to" a pay deduction that may be (or may turn out to be) impermissible under the salary basis test -- those managers (and thus the public agencies they run) will be put into a situation potentially destructive of local governments' ability to ensure "public accountability" in their operations. Those managers might have a financial stake not in minimizing overtime but in maximizing it, for those they supervise and thus for themselves.

Since such potentially no-longer-exempt managers are already a relatively small percentage of the total number of public sector employees (about 4% in the case of the Transit Authority), and such potentially no-longer-exempt managers ascend up to the

highest levels of state and local government (stopping only at managers who are directly appointed by or supervised by, or who serve as "immediate advisor[s] to," elected officials (*see*, e.g., 29 C.F.R. § 553.11(b)), almost all managers will be placed in a position of being potentially eligible for overtime pay when their responsibilities should call on them to minimize such expenses. (Indeed, among the 320 plaintiffs in the Transit Authority litigation is a former Vice President, the equivalent of an Assistant Commissioner of a city or state agency or department.) In other words, ignoring "public accountability" by applying the salary test to state and local government personnel who are clearly managerial in terms of their duties could not only lead to "a public employee work force with few exempt employees or none at all" (*Mueller v. Thompson*, 858 F. Supp. at 893), but would raise what Justice Story described as that "anxious inquiry": "*quis custodiet custodes*?" (*Briscoe v. Bank of Kentucky*, 36 U.S. 257, 348 (1837)).

The best response to that question -- i.e., who will guard the guardians (of the public's money)? -- is to avoid having to answer it by accepting the DOL's specific expression, made directly to this Court in this case, of its intentions in this area, which intentions are consistent with what almost certainly was Congress's intent. As indicated above, Congress had in mind extending the FLSA to government employees it repeatedly described as "non-supervisory," not in extending the FLSA's overtime pay provisions to any managers, let alone managers en masse. "Congress never intended to require state and local governments to choose between their obligation to remain accountable to the public and their ability to make use of the FLSA's managerial exemption." *Mueller v. Thompson*, 858 F. Supp. at 896.

Moreover, the FLSA was not intended to give well paid personnel with managerial powers and "prestige ... a [further] benefit from their employers for which they did not bargain" (*Freeman v. National Broadcasting Co.*, 80 F.3d at 86), or to create difficulties in managers' properly managing their subordinates and exercising their discretion (29 C.F.R. §§ 541.1(f), 541.2(e)) on behalf of the public employer whose affairs they direct. Accordingly, where the duties of governmental personnel are found to be (or are conceded to be) managerial, Congress's intent, and the ultimate protection of the principle of "public accountability," call for the salary basis test to be interpreted (as the DOL now says it should be interpreted) so that rare "impermissible" pay deductions do not endanger the exempt status of all other managers.

Finally, as to the one employee (or few employees) who actually may have suffered the unusual "impermissible" suspensions, the clarified view of the Department of Labor is that the so-called "window of correction" doctrine (see 29 C.F.R. § 541.118(a)(6)) lets the employer maintain the exempt status of even the impermissibly suspended employee(s) if the employer thereafter modifies its policies or practices to preclude such impermissible suspensions in the future and states that it intends to reimburse the suspended employee(s). Brief for the United States as Amicus Curiae at 10-11 [informal pagination], *Auer v. Robbins*. This view is clearly consistent with the language of the provisions themselves; that language creates such a window of correction where the rare impermissible deduction "is inadvertent, *or* is made for reasons other than lack of work" (29 C.F.R. § 541.118(a)(6), emphasis added). The petitioners' view of this language, which view would limit the window of correction to *only* inadvertent deductions, not only ignores the clearly disjunctive phrase "or ... for reasons other

than lack of work" but is now obviously and directly contrary to the DOL's view of its own salary test.

The differences among the Circuits as to the proper meaning and application of the "subject to" language, and the window of correction provisions, of the salary basis test arise from different courts' varying guesses about what the *DOL* intended. The DOL has now, in a focused and explicit way, made its intentions clear to this Court, in this case. The recent clarification by the Department of Labor of its intended meaning of its salary test thus ought to be controlling as to what the DOL's salary test means. The Department of Labor's intended meaning of its salary test seems to be the one utilized by the Eighth Circuit in *Auer*, and this Court should affirm, especially since that interpretation is consistent with Congress's general view that the FLSA should not be interpreted to provide windfalls and its specific view that the FLSA was intended to cover only "non-supervisory" public employees.

Conclusion

For the reasons outlined above, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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